No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

REPLY BRIEF FOR APPELLANT.

GEO. A. McGOWAN,
Attorney for Appellant.

Filed this _____ *day of March, 1915.*

FRANK D. MONCKTON, Clerk.

By _____ *Deputy Clerk.*

No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

REPLY BRIEF FOR APPELLANT.

The proceeding immediately before the Court is the propriety of the order of the lower Court in sustaining the demurrer of the respondent to the petition for a writ of habeas corpus filed on behalf of the detained person. As an elementary proposition it is of course conceded that for the purposes of the hearing upon the demurrer the allegations of fact contained in the petition are admitted and conceded to be true. If any of the allegations are in point of fact not true the opportunity for testing them would arise after a writ

of habeas corpus had been issued, and a return had been made thereto. The demurrer having been sustained by the lower Court, we are naturally upon this appeal confronted with a situation where for the purpose of this hearing the government must concede the truth of the allegations of fact contained in the petition, that is the significance and legal effect of their filing the demurrer. In the opening portion of the brief for the appellee additional matters not properly of record in this case have been called to the attention of the Court, and for that reason a request was made for permission to file a reply brief on behalf of the appellant so that these additional matters might be answered.

On pages four and five of the brief for the appellee are mentioned two Chinese women, Choy Gum (this appellant) and Leong Toe, whose cases are coupled by reason of the claim that they were arrested together, and on page twenty-eight of the brief is mentioned the case of Kwan So, which was pending in the lower Court contemporaneously with the cases of the two persons just mentioned. These three Chinese women, Choy Gum, Leong Toe and Kwan So were all applicants for writs of habeas corpus, and afterwards appellants to the Supreme Court, and one of their main reliances was that they had entered the United States more than three years prior to the respective dates upon which they had been arrested, and hence

having been domiciled within the United States for a period of three years, that they could not be deported under sections twenty and twenty-one of the General Immigration Act of February 20, 1907, as amended and added to by the Act of March 26th, 1910, and also that said Act was unconstitutional. The Court will recall that the amendment of 1910 removed the three year limitation from section three of the said Act, but did not amend sections twenty and twenty-one, which seemed to limit the power of the Secretary to deport within three years after original entry. When the petitions for writs of habeas corpus on behalf of these three persons were presented, the Supreme Court of the United States had not at that time decided the points at issue. These three cases were presented to the lower Court, and deportation was ordered in each of the three cases. They were all appealed to the Supreme Court. The decision of the lower Court in the case of Kwan So is reported in 211 Federal 772. During the pendency of these appeals the detained persons were admitted to bail by permission of the Secretary of Commerce and Labor. After the Supreme Court of the United States in the case of Bugajewitz v. Adams, 228 U. S. 585, and the case of Lapina v. Williams, 232 U. S. 78, had disposed respectively of the question of the three year limitation above mentioned, and the constitutionality of the Act in favor of the government, there was nothing left in the cases of these three

Chinese persons save the question of procedure, in other words, as to whether or not a fair hearing had been accorded. The aliens had been at liberty upon bond by permission of the Secretary of Commerce and Labor obtained some considerable time after the respective Court proceedings upon their behalf had been commenced. During the latter part of December, 1913, the functions formerly exercised by the Secretary of Commerce and Labor being then exercised by the Secretary of Labor, these women were by that official ordered back into custody, and were so surrendered on or about January 5th, 1914, and so remained in custody of the respondent herein until the transpiring of the facts hereinafter mentioned.

Kwan So, her right to perfect her said appeal having lapsed, petitioned again through different counsel on March 3rd, 1914 (15608), for a writ of habeas corpus, which petition was entertained by the lower Court. Upon the subsequent hearing it was shown that the immigration authorities had not only misled counsel for the alien upon the hearing, but it was disclosed for the first time that they had actually submitted much evidence to the Secretary that they had never submitted to the alien, or her counsel, and thus they had no opportunity of meeting it. The lower Court, Judge Dooling, ruled in substance and in effect that there must be some evidence presented against the alien, and that she had the right to be

apprised of all the evidence against her so that she might make answer thereto, and that it was not a fair hearing to withhold evidence from her consideration, and give her no opportunity of answering it and yet submit it to the Secretary and have a warrant of deportation issued thereon. An order of discharge was made and entered April 11th, 1914. The U. S. Attorney was apparently satisfied with the justice of this order for no appeal was taken. In the report of the Commissioner General of Immigration for the year 1914, at the top of page 324, after commenting upon this case, the following appears:

"The Department has decided not to appeal."

In the cases of Leung Toe and Choy Gum (this appellant), as they were to be presented to the Supreme Court upon appeal, reliance was mainly placed upon the question of the constitutionality of the General Immigration Act and the question of the construction of the statute relative to the three-year limitation, and these matters having subsequently to taking said appeals, been determined adversely in the two Supreme Court decisions mentioned above, that is Bugajewitz v. Adams, 228 U. S. 585, supra, and the case of Lapina v. Williams, 232 U. S. 78, supra, there remained no constitutional question open for consideration, but only questions of procedure which properly belonged before the Circuit Court of Appeals, and therefore these appellants did upon their own mo-

tion, on the 16th day of March, 1914, dismiss their appeals before the Supreme Court of the United States. Those two actions and their said motions are reported in 232 U. S. 735. This Honorable Court has held that where points of procedure were involved the appeal is properly taken to the Circuit Court of Appeals, and not to the Supreme Court of the United States.

In re Can Pon et al., 168 Fed. 479:

> "GILBERT, Circuit Judge (after stating the facts as above). It is suggested that this Court is without jurisdiction of the appeal, for the reason that the case presents questions of the application of the Constitution of the United States. We find no ground for so holding. If the case as brought to this Court presented constitutional questions only, the appellate Court jurisdiction of the Supreme Court, would, of course, be exclusive. It is doubtful whether the appeal does involve the application of the Constitution. No such question is suggested before this Court. It is true that the petition alleges that certain rules promulgated by the Secretary of the Department of Commerce and Labor are unconstitutional, but those rules have been before the Supreme Court and have been sustained in United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. ed. 917, and Chin Yow v. United States, 208 U. S. 8, 28, Sup. Ct. 201, 52 L. Ed. 369."

The record in the case of Leung Toe will show that she was deported by the respondent in this action, the Commissioner of Immigration, on April 4th, 1914. The petitioner in this present case, Choy Gum, had been in the custody of the respond-

ent herein since about January 5th, 1914, and her appeal to the Supreme Court was dismissed on March 16th, 1914, and she therefore on April 16th, 1914, a month after the dismissal of her case before the Supreme Court filed a new application for a writ of habeas corpus, which particularly raised new and further questions dealing with the unfairness of the hearing accorded her, and which cured certain defects in the manner in which certain elements of unfairness were pleaded in the original petition presented upon her behalf. That she was within her rights in presenting this second application, and that the Court properly exercised its discretion in permitting her to do so, and in considering the same, was upheld in the case of Kwan So as hereinbefore stated, and also very weighty authority for the presentation of such an application for a writ of habeas corpus is contained in the case of Carter v. M'Claughry, 105 Fed. 614 (before Thayer, Circuit Judge, and Hook, District Judge, the opinion being written by the latter):

> "At the threshold of the case counsel for respondent interposes the objection that by reason of the aforementioned proceedings in the courts, and the orders and judgments rendered by them respectively, the matters sought to be presented by petitioner are res adjudicata, and that this court is precluded from re-examining them. It is true, the merits of Carter's case as presented were considered by the Circuit Court for the Southern District of New York, and by the Circuit Court of Appeals for the Second Circuit, but, while the judgments of those courts are recognized as of highly

> persuasive authority, they do not amount to res adjudicata, nor prevent a re-examination of the same questions in a subsequent habeas corpus proceeding. The action of the Supreme Court was confined to a denial of the application for a writ of certiorari, which is not allowed as a matter of right, and to a dismissal of the appellate proceedings without a consideration of the merits of the case. It is, therefore, the duty of this court to give due consideration to the case presented."

At the bottom of page six in the brief for the appellee the district attorney speaks of petitioner's counsel not being content to abide by his dismissal of the case in the Supreme Court, but immediately surrendered the alien, Choy Gum, to the custody of the immigration officials at Angel Island, and filed a new petition for a writ of habeas corpus. It is to be regretted that matters ouside of the record should be presented in the brief in such a misleading manner, and in such a form as to be quite at variance with the true condition, but this was probably due to inadvertence on the part of the attorney for the government in not acquainting himself with the facts before making such a statement. The Immigration records will show that this appellant, Choy Gum, was surrendered into custody on or about January 5th, 1914, and that her case was dismissed before the Supreme Court upon her own motion upon March 16th, 1914, and that the companion case of Leung Toe, who was surrendered into custody at the same time, was dismissed at the same time, and Leong Toe was deported by the

Commissioner, the respondent and appellee herein, upon April 4th, 1914. The Attorney-General knew of the dismissal of these two appeals, and if he was dilatory in placing the remittitur in the hands of the local U. S. Attorney, that is not the fault of the appellant, who in fact believed she was about to be deported. The appellant alleged in her petition (record, page 11) that she expected to be deported at a certain time and place by the respondent, and in demurring to the petition the respondent admits the truth of that allegation for the purpose of the demurrer, and also for the purpose of this appeal. It is even conceded upon the part of the government that long before the date of the hearing and decision of this matter by the trial Court, that the remittitur had been executed and approved, so at best the point had then lost its force and effect. The only matter adjudicated in this case in the former proceeding was that the first petition for a writ of habeas corpus did not state facts sufficient to entitle the petitioner to the relief sought. This was only the adjudication of the lower Court, and the petition never claimed the attention of the Supreme Court of the United States. The attorney for the appellee further on page seven of his brief states that the new petition for a writ of habeas corpus, which is the one herein under consideration, was based upon the same record, and set forth the same facts and conditions as the former petition. Obviously the immigration record in the possession of the petitioner was the same, but this does not apply to the petition which was

presented to the Court. The two petitions are not the same, and differ in almost all of their allegations as a reading thereof would show. Two of the allegations contained in the former petition were objectionable, and were not sufficiently pleaded in that they were allegations which were merely conclusions or charges of bad faith, and such as were held to be insufficient in the case of Law Wah Suey v. Backus, 225 U. S. 460, and in the present petition these matters are pleaded in such a way as to properly set forth the facts, and avoid the objections sustained by the Supreme Court in the case last mentioned. The two points which were objectionable and so were repleaded and to which this reference is made constitute the first and second allegations of unfairness which are contained on pages 5, 6, 7 and 8 of the record. The three remaining allegations of unfairness, third, fourth and fifth, which are on pages 8, 9 and 10 of the record, were not contained in the petition first filed upon behalf of the appellant. In view of this statement it seems that the attorney for the appellee is unwarranted in making the statement that the two petitions set forth the same facts and contentions, for such is not the case. The third allegation in the petition (record, pages 8 and 9) was especially framed to meet the condition which developed in the case of Kwan So hereinbefore mentioned, and which resulted in her discharge. The intimation that because the immigration record was the same in each instance that a different petition based thereon could not be filed is hardly in

accordance with the principles of pleading. It is not incumbent upon the Court to go through the immigration record in an exhaustive manner to search for errors that have not been alleged. The pleadings themselves mark the limitation of the Court's review of the subject matter. To raise a point to claim the attention of the Court, it must be presented by the pleadings. In the case of U. S. v. Ju Toy, 198 U. S. 253, not only does the Supreme Court accept this view, but the judges of the Circuit Court of Appeals for this circuit in framing the questions certified to the Supreme Court, which resulted in the handing down of this decision, were careful to state that the petition did not allege matters of unfairness, and the beginning of the decision of the Supreme Court, after reciting the three questions, is as follows:

> "We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged."

A recent decision by the Circuit Court of Appeals for the Fourth Circuit in the case of U. S. v. Sprung, 187 Federal Reporter 903, illustrates quite forcibly the point which it is desired to be made on behalf of the appellant that it is essential that the petition should allege the different elements of unfairness. The opinion of the majority of the Court upon this point is as follows:

> "The law is well settled that, where such hearing has not been given by the executive officials, their action will be reviewed, and if the facts justify, reversed. Chin Yow v. United

States, 208 U. S. 8, 28, Sup. Ct. 201, 52 L. Ed. 369. In this case there is no allegation that a fair hearing was not given the petitioner."

As to just what is meant by the majority of the Court as a fair hearing is ably expressed in the dissenting opinion of Circuit Judge Pritchard in which he elaborates upon the views of the majority of the Court which were undoubtedly expressed in the conference of the members of the Court prior to the formulation of the decision in question. The quotation from the dissenting opinion is from page 908 and 909:

"While these allegations are traversed by the return of the inspector in whose custody she was held, the return, among other things, contains the following allegation:

'That even if she had been married to the said Otto Sprung, as stated in said petition, which the undersigned denies, that would not affect her liability to deportation, as, being a prostitute and therefore not a person of good moral character, she would not be entitled to naturalization as a citizen of the United States under the act of Congress on that subject.'

"It should be observed that the foregoing statement clearly indicates that the inspector was of the opinion, notwithstanding the fact that it might be shown that the petitioner was the wife of an American citizen, that such showing on her part would not relieve her from liability to deportation. The inspector in his return goes still further and insists that ' * * * she would not be entitled to naturalization as a citizen of the United States under the Act of Congress on that subject'. It is insisted by a majority of the court that there are only two instances where the court below would have

jurisdiction to grant a writ of habeas corpus: First, where the pleadings raise a question of law, second, where it is alleged that the petitioner can not obtain a fair and impartial trial before the inspector. Considering the last proposition first, does anyone for a moment imagine that the petitioner could have secured a fair and impartial trial before the inspector in view of the statement just quoted? The fact that the inspector in the face of the decisions of various courts, including the opinion of Justice Harlan, is so reckless as to state in his return that notwithstanding the fact she was married as alleged, still, according to his notions of the law, this unfortunate woman is a subject of deportation—this statement within itself is enough to give one an idea as to the kind of treatment the petitioner would obtain if called upon to appear before him. He seems to be of opinion that once a party is arraigned before him (as the petitioner in this instance) it necessarily follows that she should be deported, notwithstanding the fact that she may be able to show that she is an American citizen by virtue of her marriage. While there is no formal allegation in the petition to the effect that the petitioner could not secure a fair and impartial trial before the inspector, yet the statement of the inspector as to the law bearing upon the points in question afford ample reason why the court below should have assumed jurisdiction. While it would be more formal for the allegation to appear in the petition, yet if, from an inspection of the petition together with the return (and they are to be treated as one for the purpose of determining as to whether the court had jurisdiction), it clearly appears that the petitioner cannot secure a fair and impartial trial, then undoubtedly the court below would have jurisdiction."

The petition in the case at bar contains numerous assignments of unfairness in the hearing accorded by Immigration Inspector Ainsworth, and the fact that he was the arresting officer as disclosed by the record, and more particularly pointed out in the opening brief on behalf of this appellant, should have disqualified him from conducting the hearing in question. A case which illustrates the impropriety of Inspector Ainsworth placing his unverified statements in the record is that of Ex parte Lam Fuk Tak, 317 Federal 468, in which it is held on page 469:

> "It would seem unnecessary to pursue this investigation. Petitioner, a merchant in China, comes here and is admitted as a merchant, bring $1000.00 in gold, two months since; has been in Wilmington about one month. Except for the statement inserted in the record, not under oath, and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him."

Another case which corroborates many of the contentions advanced by this petitioner is that of Ex

parte Lam Pui, 217 Federal Reporter 456. There is a great deal in this opinion which is applicable to the present case, and it is the earnest wish of the appellant that the said opinion might be read in its entirety by the learned judges of this Court. One of the paragraphs of the decision on page 462 is as follows:

> "While a statute conferring power to summarily hear and determine rights of person or property, and make final orders affecting such rights, will be so construed as to effectuate the purpose of the legislative department of the government, in respect to its administration, those methods of procedure which experience has demonstrated to be necessary for the protection of such rights against oppressive and arbitrary conduct will be enforced. The courts will not weaken the efficiency of the legislation, or the power conferred upon the administrative officer; but they will not sacrifice substantial and essential rights to summary procedure. This principle is especially applicable when human liberty is involved. While the petitioner is not entitled to demand the constitutional guaranties accorded to our citizens of birth and adoption, he is entitled, by virtue of the certificate issued and passed upon by the lawful authorities, under the supreme law of the land—the treaty between this republic and China—to demand that he be accorded a fair hearing, as near as may be in accordance with elementary rules of procedure obtaining in all nations having organized government, securing the liberty of its own citizens and those of other nations within its borders by invitation or permission.

A more recent case, and one which substantiates the contention of the appellant that it is an error

to deprive her of the right of counsel until after it would be of substantial importance to her is exemplified in the case of Ex parte Hidekuni Iwata, 219 Federal 610, in which it is held (italics our own):

> "In the hearings to be held by the departmental officers the ordinary judicial procedure with its consequent limitations, is not necessarily to be followed. 'Due process of law' is secured, as to such aliens as may be brought before the immigration officers, if they are given substantial notice of the reasons urged why they should be deported from this country, if they are given a fair and reasonable opportunity to present evidence controverting any evidence adduced by the department and tending to exculpate them, *if they are afforded at some stage of the hearing reasonably early therein, so as to be of some substantial advantage to them, the opportunity to secure and have the advice and assistance of counsel,* and if it appears, upon the whole proceeding, that the department acted in good faith, and that its determination, as finally arrived at, was fair, and not an arbitrary one, or one induced by a manifest disregard of the alien's rights in the premises."

The appellant having answered the additional matters presented on behalf of the appellee, now respectfully feels that this Court should find that the warrant of deportation issued in this matter is illegal by virtue of having been issued as a result of a hearing which was manifestly unfair, and which deprived the appellant of a fair opportunity to be

heard and present her defense to the charge made against her.

Dated, San Francisco,
March 24, 1915.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellant.